IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| American Bankers Association,<br><br>Plaintiff,<br><br>v.<br><br>National Credit Union Administration,<br><br>Defendant. | ) | Civil Action No. 99-00042 (CKK) |

**PLAINTIFF AMERICAN BANKERS ASSOCIATION'S REPLY MEMORANDUM IN SUPPORT OF ITS APPLICATION FOR A PRELIMINARY INJUNCTION**

Plaintiff American Bankers Association ("ABA") respectfully submits this reply memorandum in support of its application for a preliminary injunction.

A. The Credit Union Membership Access Act ("CUMAA").

The National Credit Union Administration ("NCUA") says that "[i]n August 1998, Congress abrogated [the Supreme Court's decision in] First National by amending the FCUA to incorporate . . . NCUA's policies" regarding the chartering of multiple common bond credit unions. (NCUA Opp. at 1.) That is what the NCUA and the credit union lobby wanted, but that is not what happened. NCUA's illegal policy, for example, contained no limits on the size of a group that could join a multiple common bond credit union. Congressman LaTourette did introduce a one-paragraph bill that would have reinstituted that policy.[1/] But the final legislation was dramatically different. It was, as Credit Union National Association ("CUNA")

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1/ A copy of Congressman LaTourette's bill (H.R. 1151) is attached hereto as Exhibit A for ease of reference.

forthrightly admits here, a compromise, just like other legislation Congress passes when competing industry groups have strongly different views.[2/]

Rather than allowing unlimited multiple group credit union expansion, as did the NCUA's illegal pre-First National policy, the CUMAA limits the formation and growth of multiple common bond credit unions. It does that in part by directing the NCUA to "encourage the formation of separately chartered credit unions . . . whenever practicable and consistent with reasonable standards for the safe and sound operation of the credit union." 12 U.S.C. § 1759(f)(1). The NCUA tells this Court that this provision of law is a broad "authoriz[ation] [to] the NCUA to approve expansion of multiple common-bond credit unions," (NCUA Opp. at 8), but the plain language of the statute, as well as its structure and legislative history, show otherwise.[3/]

The CUMAA also specifically provides that only groups having fewer than 3,000 members shall be eligible for inclusion in multiple common bond credit unions, unless one of three specific exceptions is satisfied. 12 U.S.C. § 1759(d)(1) ("[e]xcept as provided in paragraph (2), only a group with fewer than 3,000 members shall be eligible to be included in" a multiple common bond credit union) (emphasis added). Contrary to the NCUA's assertion here, (see, e.g., NCUA Opp. at 26, n. 15), neither this provision, nor any other for that matter, provides that

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2/ (See CUNA Answer ¶ 12 (admitting that "CUMAA was not 'compromise' legislation in a manner that differentiates it from other legislation passed by Congress") (emphasis added)).

3/ E.g., S. Rep. No. 105-193, at 7 (1998) ("This section provides for the NCUA to encourage the formation of separately chartered credit union wherever possible, consistent with safety and soundness, instead of including an additional group within an existing credit union's field of membership") (emphasis added).

groups having fewer than 3,000 members are to be automatically allowed to join a multiple common bond credit union, and both section 1759 and the CUMAA's legislative history affirmatively refute such a reading of the statute. See H.R. Rep. No. 105-472, at 20 (1998).

The CUMAA also makes clear that exceptions to the 3,000 member limit are to be narrowly construed and sparingly applied. Letter of Congressman John J. LaFalce, Nov. 12, 1998, at 2 ("[W]e sought to limit or restrict this expansion [of multiple common bond credit unions] in ways that would reinforce traditional credit union principles and address competitive concerns of other financial institutions") (attached as Exhibit B to the Declaration of Jonathan Mastrangelo) ("Mastrangelo Decl."); H.R. Rep. No. 105-472, at 19; S. Rep. No. 105-193, at 7.

B. The ABA Will Likely Succeed On the Merits

When the CUMAA is read in light of the actual Chevron standard -- that is, when the language, structure and purpose of the Act are examined to ascertain the intent of Congress -- it is clear that the parts of the rule we challenge are invalid. Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 n.9 (court uses "traditional tools of statutory construction" when determining if intent is clear under "step one"); National Credit Union Admin. v. First Nat'l Bank & Trust, 118 S. Ct. 927, 939-40 (1998) (applying "tools of statutory construction" to determine that intent of Congress is clear and statute is invalid).[4/]

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4/ ABA's claims are ripe because they are fit for decision and because postponing review will cause hardship. See, e.g., Grand Canyon Air Tour Coalition v. FAA, 154 F.3d 455, 471 (D.C. Cir. 1998). The issues we have presented -- ranging from whether the NCUA may establish a presumption against groups under 3,000 forming their own credit union, to whether it has correctly construed the grandfather provisions of the CUMAA, to whether family and household members must count toward the 3,000 member limit established by the statute (and the rest) -- are significant legal issues, now quite fully briefed, that do not require further factual

(continued...)

1. Multiple Bond Credit Unions.

a. Expansion of Multiple Credit Unions By Adding Groups Over the 3000 Limit. The CUMAA provides that multiple common bond credit unions can add a group over 3,000 only if the group could not operate a separate credit union itself because it (1) lacks sufficient resources to operate a credit union, (2) possesses demographic or other characteristics "that may affect the financial viability and stability of a credit union," or (3) is found to be "unlikely to operate a safe and sound credit union." 12 U.S.C § 1759(d)(2). Congress said it "d[id] not intend for these exceptions to provide broad discretion to the [NCUA] to permit larger groups to be incorporated within or merged with other credit unions." H.R. Rep. No. 105-472 at 19; S. Rep. No. 105-193 at 7. But the NCUA tells this Court that the statute lets it give "whatever weight it sees fit," (NCUA Opp. at 25), to whether the group wants to operate a separate credit union, rather than (as we contend the statute requires) granting an exception to the 3,000 member limit only when the group is incapable of operating a separately chartered credit union.[5/]

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[4/] (...continued)
development for purposes of determining whether ABA has a likelihood of success on the merits. And, for reasons described below in connection with the irreparable injury point, ABA's members will indeed suffer a hardship if a judicial determination of the legality of the NCUA's actions is postponed.

[5/] Both the NCUA and National Association of Federal Credit Unions ("NAFCU") contend that the plain language of CUMAA supports the agency's position, relying alternatively on the "virtually unrestricted language" of section 1759(d)(2)(A)(ii), (NCUA Opp. at 25), and the reference to "volunteer . . . resources" found in subparagraph (d)(2)(A)(i). They are wrong. The plain language of the Act in fact refutes the NCUA's position because paragraph (d)(2)(A), which modifies the language relied on by both the NCUA and NAFCU, expressly limits the factors that justify exceptions to the 3,000 member limit to those that demonstrate that the common bond (continued...)

The NCUA contends that the ABA's literal reading of the statute must be in error because "[u]nder the plaintiff's view . . . the NCUA would be compelled to charter an unwilling group separately, irrespective of the group's commitment to operating a credit union on its own." (NCUA Opp. 24-25.) That is profoundly wrong. If the agency determines the large group could operate its own credit union, it should simply deny the application to add it to a multiple common bond credit union. Nothing "compels" the agency to grant a charter for which a group has not even applied.

The NCUA's treatment of the CUMAA's limitation on multiple common bond credit unions is distressingly reminiscent of its earlier treatment of the limitation found in the old Federal Credit Union Act ("FCUA"). By allowing groups with over 3,000 members to qualify themselves for membership in a multiple common bond credit union, with the simple assertion that they would rather not have a separate charter, the new rule, like the one struck down in First National, "has the potential to read [the statutory membership limitation] out of the statute entirely." First Nat'l Bank, 118 S. Ct. at 940.

b. The NCUA's Presumption Against Separate Charters for Groups Under 3,000. The NCUA contends that its presumption that groups having fewer than 3,000

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2/ (...continued)
group "could not feasibly and reasonably establish a new single common bond credit union . . . ." Id. (emphasis added). The word "feasibly" means "capable of being accomplished . . . or possibly," The American Heritage College Dictionary at 499 (3d. ed. 1993), and, by including that word, the statute limits the granting of exceptions to cases where the common bond group is incapable of operating a separate credit union, rather than ones where it simply does not want to.

primary potential members cannot form economically viable, separately chartered credit unions should be upheld under "step two" of Chevron because (1) the text of the CUMAA "makes no express mention of 'presumptions' about separately chartering new groups," (NCUA Opp. at 25) and (2) the final rule asserts that the presumption is "'not intended to undermine the statutory requirement to encourage the formation of new credit unions.'" (Id. at 28) (citation omitted).[6/] The NCUA is wrong on both counts. Congress' intent, as reflected clearly in the language, structure and legislative history of the CUMAA, was that the agency not assume that groups below the 3,000 member limit cannot form separately chartered entities; and the existence of such a presumption, notwithstanding the rule's obfuscatory language, does have the effect of undermining the statutory mandate that the agency encourage the formation of separately chartered credit unions.

Any fair reading of the language, purpose and history of the CUMAA makes clear, we submit, that the NCUA was not to assume that groups having fewer than 3,000 members cannot form their own separately chartered credit unions. The statute directs the NCUA to charter separate credit unions whenever possible. The House Report states

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[6/] The NCUA's brief engages in a semantical game. On the one hand, it contends that IRPS 99-1 "contains no . . . presumption" against the chartering of separate credit unions having fewer than 3,000 members, (NCUA Opp. at 26); however, the NCUA's brief acknowledges (as it must) that the agency will take a "hard look" at groups having fewer than 3,000 potential primary members before it assumes that such groups are less likely to be "economically viable." (Id. at 27). This is a distinction without a difference because the statutory test for chartering a group separately is economic viability -- i.e., whether it would be "practicable and consistent with reasonable standards for the safe and sound operation of the credit union." 12 U.S.C. § 1759(f)(1)(A). If the agency creates a presumption that certain credit unions are not economically viable, then it is creating a presumption that they cannot be separately chartered.

unequivocally: "[T]he 3,000 member figure is not intended to indicate that groups below the 3,000 member limit are incapable of forming new, viable credit unions." H.R. Rep. No. 105-472, at 20. Yet, the NCUA's rule makes precisely the assumption Congress rejected. The inconsistent "findings" made by the NCUA in its final rule -- which simultaneously purport to justify the need for the presumption on the basis of prior experience, see 63 Fed. Reg. at 72,000 ("based on historical data and evidence of economic viability . . . a credit union with fewer than 3,000 primary potential members . . . may not be economically advisable"), even while noting that a substantially lower "economic viability" figure had in fact "worked the past," id. at 72,001 -- are irrelevant. Congress considered and stated its conclusions on this issue. That is the "end of the matter." Chevron, 467 U.S. at 842-43.

The NCUA does not, and cannot, explain how its special burden on groups under 3,000 can be given effect without both discouraging the formation of separately chartered credit unions and encouraging such groups to join in a multiple common bond credit union -- in effect, the old, illegal NCUA policy.[2/] This NCUA rule cannot be squared with the statute. See 12 U.S.C. § 1759 (the NCUA is to encourage the formation of separately chartered credit unions); H.R. Rep. No. 105-472, at 19 ("The Committee does not intend for this numerical limitation to be interpreted as permitting all groups with 3,000 or fewer members to be included within the field of membership of an existing credit union.").

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2/ This result occurred instantly. As reflected in an exhibit attached to the brief submitted by NAFCU, under its new rule the NCUA has not rejected a single application submitted by a common bond group with fewer than 3,000 primary potential members seeking membership in an already existing credit union. (NAFCU Opp. at Ex. 5.)

c. Exclusion of Family and Household Members for Purposes of the 3,000 Limit. The NCUA acknowledges that the CUMAA requires that it consider all persons sharing the common bond when calculating group size for purposes of the 3,000 member limit but contends that the plain language of the CUMAA directs it to count only "primary potential members" because "their spouses, children and relatives" do not share the common bond. (NCUA Opp. at 28.) In fact, the CUMAA does even not contain the phrase "primary member," and immediate family and household members are eligible for membership in a common bond credit union precisely because they do share the common bond.

The law applicable to credit union membership in both single and multiple common bond credit unions is straightforward and clear: To be eligible for membership in a credit union, a person must be part of the common bond group. 12 U.S.C. § 1759(b)(1) (a single common bond credit union has "[o]ne group that has a common bond of occupation or association"); 12 U.S.C. § 1759(b)(2) (a multiple common bond credit union has "more than one group . . . each of which has (within the group) a common bond of occupation or association"). Persons who do not share the common bond are not part of the group, and are therefore not eligible as group members to join the credit union.

The statute provides just two "exceptions" to its general membership requirements in section 1759(c). One is for persons whose membership is "grandfathered," 12 U.S.C. § 1759(c)(1); the other is for "person[s] or organization[s]" in "underserved areas." Id. § 1759(c)(2). Everyone else joining a credit union must share that credit union's single (or one of its multiple) common bonds.

The CUMAA does not have or need an exception for immediate family and household members because the NCUA has long taken the position that family members do share the group's common bond.[8/] The NCUA's prior membership rule had expressly provided that immediate members were part of the common bond of occupation or association, identifying them as persons "sharing [the] common bond." 59 Fed. Reg. at 29,079 (emphasis added). And, as we noted in our opening brief, IRPS 99-1 specifically retains that policy by providing that immediate family and household members are eligible for credit union membership because they are "persons sharing [the] common bond." 63 Fed. Reg. at 72,037 (emphasis added). In a telling omission, neither the NCUA's brief, nor the briefs submitted by the credit union intervenors, respond to this point.

d. The Voluntary Merger Rule. The new NCUA rule will permit voluntary mergers of healthy multiple common bond credit unions containing groups of fewer than 3,000 members without a determination as to whether any or all of those groups could feasibly create a separate credit union.[9/] We contend that this rule violates the statutory directive that NCUA

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[8/] The passage of the House Report relied on by the NCUA is not to the contrary. (NCUA Opp. at 29.) That passage only states the obvious -- that common bond groups are formed around bonds of association and occupation. It does not address the question of whether persons related to "primary members" are also considered part of the occupational or associational group. Both the statute and the NCUA's current and prior membership rules make clear, however, that these persons must be members of the common bond.

[9/] See 63 Fed. Reg. at 72,003 (allowing mergers of healthy credit unions that "contain[] select employee groups of less than 3,000 potential primary members"). The NCUA has represented to this Court that it will comply with the statutory requirements in assessing voluntary mergers of credit unions whose field of membership includes groups of over 3,000 members. (NCUA Opp. at 31.)

encourage the formation of separately chartered credit unions whenever possible. 12 U.S.C. § 1759(d). The NCUA's response is basically that the statute never expressly says that it has to do this when considering mergers. (NCUA Opp. at 30.)

One fundamental flaw in the NCUA's argument is that it is a creature of statute, and it needs to demonstrate that it has authority to take any action it takes. The NCUA does not point to any statutory language that grants it express authority to authorize voluntary mergers of financially sound credit unions, and indeed there is none.[10/] If mergers are to be permitted at all, it must be on the theory that they are just another way for a multiple common bond credit union to expand its field of membership. But, under the CUMAA, a multiple common bond credit union can lawfully expand its field of membership only subject to a carefully crafted set of limitations imposed by Congress, including a determination by the NCUA that the group proposed to be added cannot operate its own credit union. The NCUA rule says it will not make that determination in connection with voluntary mergers involving groups under 3,000, even though it recognizes that it has to make such a determination in connection with other expansions of multiple common bond credit unions. That rule violates the statute.

e. The Reasonable Proximity Rule. The NCUA's membership rule violates the CUMAA, even though "reasonable proximity" is not expressly defined in the statute, because Congress made clear that the NCUA's definition of "service facility" was to remain the

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10/ The only statutory provision that expressly grants the NCUA the authority to approve mergers of credit unions having dissimilar common bonds applies by its terms only where one of the merger parties "is insolvent or is in danger of insolvency," 12 U.S.C. § 1785(h) -- so-called emergency mergers, which are not at issue here.

same, and contrary to that intent, the rule dramatically expands the definition of "service facility."

Both the House and Senate Reports make clear that Congress did not intend for the NCUA to alter its definition of service facility. H.R. Rep. No. 105-472, at 19; S. Rep. No. 105-193 at 7.[11/] The NCUA tries to dismiss this legislative history as irrelevant because it appears in a section of the House and Senate Reports concerning "service by credit unions to underserved areas . . . ." (NCUA Opp. at 34, n.20.) But in its preamble to IRPS 99-1, the NCUA relied on these very passages from the House and Senate Reports in recognizing that: "The legislative history of the CUMAA is clear that the NCUA should not treat ATMs as service facilities for select group expansions." 63 Fed. Reg. at 72,002.

The plain fact is that Congress intended for the NCUA to retain its then-existing definition of "service facility" -- the agency's longstanding benchmark for the geographic location of a credit union. S. Rep. No. 105- 193, at 7 ("[t]he term 'facility' is meant as it is defined by the NCUA") (emphasis added). Under that definition, a "service facility" is a place "where . . . a member can deal directly with a credit union representative . . . ." 59 Fed. Reg. at 29,078. The NCUA, however, broadened that definition substantially, requiring that the new group be only reasonably proximate to an electronic service center, without any requirement that a member be able to "deal directly with a credit union representatives" there.

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11/ The NCUA's brief states incorrectly that "[t]he Senate Report cited by Plaintiff, as relevant here, has no similar language . . .[to the House Report's]." (NCUA Opp. at 34 n.20.) In fact, the Senate Report provides: "The term 'facility' is meant as it is defined by the NCUA. An automatic teller or similar device does not qualify as a service facility." S. Rep. No. 105-193, at 7.

## 2. Single Common Bond Credit Unions

The NCUA Rule provides that employees of two companies automatically and always share a "single common bond" by reason solely of the fact that one of the companies has a 10 percent ownership stake in the other. This is a violation of the requirement that all members of a single common bond occupational credit union share a single common bond -- a requirement of the original 1934 Act that Congress did not change in the CUMAA.[12/]

The NCUA defends the 10 percent rule by analogy to the Federal Reserve's regulations interpreting the Change in Bank Control Act ("CIBC Act"). (NCUA Opp. at 36-37); 63 Fed. Reg. at 72,007. But this is a plain misuse of the CIBC regulations. Those regulations only create a rebuttable presumption of control when a person owns 10 percent of the voting stock of a bank and only then when other specific conditions are met, including that no other shareholder owns a greater percentage of that voting stock. 12 C.F.R. § 225.41. By contrast, IRPS 99-1 states that, by operation of law, when Company A owns 10 percent of Company B the employees of both companies always and necessarily share a common bond of occupation -- regardless of any other facts, including whether some other entity owns the other 90 percent of

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12/ The NCUA quotes from the decisions of the Supreme Court and this Circuit in First National Bank that employees of subsidiaries share a common bond with the employees of the parent enterprise. (NCUA Opp. at 16 n.10.) However, there is nothing in the Supreme Court's opinion to suggest that the Court was giving the term subsidiary other than its common meaning, which is a corporation "in which another corporation (i.e., parent corporation) owns at least a majority of the shares." Black's Law Dictionary 1428 (6th ed. 1990). Moreover, the D.C. Circuit was clearly discussing wholly owned subsidiaries. First Nat'l Bank, 90 F.3d at 528 ("suppose that Company A buys Company B . . . [j]oint ownership of Companies A and B create a common bond" (emphasis added)). In fact, the D.C. Circuit expressly cautioned the NCUA from reading the phrase "common bond" in a manner that would "drain the phrase. . . of all meaning," id., which is precisely what the agency has done in adopting the 10 percent ownership rule.

Company B, or the two companies are competitive in the marketplace or even locked in a takeover battle That rule is inconsistent with the "single common bond" requirement of the Act -- and wholly unjustified by the CIBC regulations that NCUA cites to defend itself.[13/]

### 3. The "Grandfather" Provision

There is no serious dispute that, as a matter of simple English, the grandfathering provision, on its face, applies only to persons who were members of unlawfully added common bond groups on the date of the enactment of CUMAA. That is in fact what the statute says:

> A member of any group whose members constituted a portion of the membership of any Federal credit union as of the date of enactment shall continue to be eligible to become a member of that credit union, by virtue of membership in that group, after the date of enactment.

12 U.S.C. § 1759(c)(1)(A)(ii) (emphasis added). A "member of a group" can "continue" to be eligible after the date of enactment only if he or she was a member of the group on the date of enactment.

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13/ The NCUA argues that the 10 percent ownership limitation is a more restrictive approach than its prior policy. (NCUA Opp. at 36.) This is disingenuous (at best). In rules adopted in 1989, the NCUA stated that occupational common bond means "employment by the same enterprise" and includes employment in a "parent corporation and its wholly owned subsidiaries." 54 Fed. Reg. 31,165, 31,169 (1989)(emphasis supplied). In 1994, when the NCUA revised the rules it promulgated in 1989, it included "employment in a corporation or other legal entity with an ownership interest in or by another legal entity" in the definition of occupational common bond. 59 Fed. Reg. 29,066, 29,075 (1994). But the NCUA said that this change in language was made only "to provide more clarity," and it expressly disavowed substantively broadening the term occupational common bond. Id. at 29,069 ("the Board does not see the need to broaden the definition of occupational common bond at this time"). The 10 percent rule is thus, in fact, far less restrictive than the NCUA's prior approach.

The NCUA says that the grandfather is not limited to members of the group at the date of enactment of CUMAA because of the following sentence in the Senate Report:

> [A]ny individual member of a group that is part of a credit union shall continue to be eligible to become a member of that credit union and any new member of such group is also eligible.

S. Rep. No. 105-193, at 7 (emphasis added).[14/]

But this sentence exactly makes our point. The first part of the sentence (not underlined) is virtually identical to the statutory language; the second part of the sentence (underlined for clarity above) is the part of the sentence that the NCUA relies on for its position. But the second part of the sentence is not in the statute.

The NCUA's proposed construction of the grandfather provision, in addition to being unwarranted by the language, would transform the statute from a transitionary grandfathering provision -- allowing credit unions to gradually come into compliance with the law over time -- into an indefinite extension of the NCUA's unlawful chartering policy. We submit that if Congress had meant for the grandfathering provision to have this expansive meaning, it would have expressly provided additional language, like that in the Senate Report, in the text of the statute. But it did not.

The NCUA says that reading the statute as it is written will lead to absurd results, suggesting even that multiple common bond credit unions will "crippled," (NCUA Opp. at 39); CUNA says they will "wither and die." (CUNA Opp. at 10.) This is just not so. If the statute is read to mean what it says, the provision will do what "grandfathering" clauses usually do --

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14/ The NCUA and NAFCU also cite a similar statement from the House Report. (NCUA Opp. at 39; CUNA Opp. at 10.)

allow for an orderly transition period that leads to conformance with law. The affected credit unions will simply have to comply with the CUMAA in order to add members who joined the common bond group after the CUMAA was passed.

In other words, the statute sensibly works this way: persons who, as of August 7, 1998, were members of a common bond group that was illegally part of a multiple common bond credit union under First National can join without regard to the new requirements in the CUMAA. If the credit union (say, AT&T Federal) wants to add persons who later join the group (say, persons who become employed by Pepsi after August 7, 1998), the credit union simply needs to apply to the NCUA to expand its field of membership under the CUMAA. If the group meets the CUMAA requirements, the field of membership will be expanded. If -- as is plainly the case -- the NCUA and its allies fear that many such groups will not meet CUMAA's requirements, their predictions of disaster simply confirm their intense desire to avoid having CUMAA's restrictions apply to them forever. That is precisely what Congress did not intend.[15/]

## C. The ABA Will Suffer Irreparable Injury if a Preliminary Injunction is Not Issued.

The NCUA's contention that ABA members are not irreparably injured by the unlawful expansion of the credit unions with which they compete is wholly undermined by Judge

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15/ There is nothing draconian about that result, which does nothing more than give the statute its intended "grandfathering" effect, and it comports with this Circuit's general interpretation of grandfathering clauses. See National Assoc. of Cas. & Surety Agents v. Federal Reserve, 856 F.2d 282, 286 (D.C. Cir 1988) ("the Board recognized that grandfather provisions must be construed narrowly, as exceptions to general rules").

Jackson's contrary holding in First Nat'l Bank & Trust Co. v. NCUA, Nos. 90-2943, 96-2312 (D.D.C. Oct. 25, 1996) (attached as Exhibit C to CUNA Opp.). Faced with exactly the same arguments by exactly the same parties, Judge Jackson held that the ABA's members "sustain irreparable injury with each new addition to the membership rolls of competing financial institutions, because the amount of financial business they will lose in consequence is impossible to ascertain for purposes of an award of damages." Id. at slip op. 5-6 (emphasis added). That conclusion is right and dispositive. Indeed, Judge Jackson's decision should collaterally estop the NCUA and its allies from relitigating the issue here.[16/]

Even if the NCUA were not precluded on the irreparable injury issue, our opening memorandum and the accompanying Declaration of James Chessen make clear that IRPS 99-1 causes irreparable harm to plaintiffs. It is obvious, as a matter of common sense, that as credit unions get larger, they take customers away from the tax-paying institutions that compete with them. (See Chessen Decl. ¶¶13, 16-17.) This harm is irreparable because, as Mr. Chessen explained, revenue lost to unfair competition can never be completely recovered. (See Chessen Decl. ¶ 16.) As Judge Jackson held in First National, Nos. 90-2943, 96-2312, slip op. at 5-6, "[T]he amount of financial business [ABA members] will lose . . . is impossible to ascertain for

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16/ All the requirements for collateral estoppel are fully satisfied here. See Securities Indus. Ass'n v. Board of Governors, 900 F.2d 360, 363 (D.C. Cir. 1990). First, the question whether the ABA and its member institutions are irreparably harmed by the NCUA's expansive interpretation of credit union membership eligibility rules was "actually litigated" before Judge Jackson. Second, whether the ABA and its members were irreparably harmed was an issue "necessary to [Judge Jackson's] judgment" granting both preliminary and permanent injunctive relief in that case. Third, the parties to the two proceedings are identical; the NCUA had ample opportunity to contest the issue in the earlier and had no reason not to mount a vigorous defense of its position.

purposes of an award of damage, if indeed anyone were liable." That is the essence of an irreparable injury.[17]

Moreover, the harm ABA member institutions claim here is hardly speculative, future injury. IRPS 99-1 has been in effect since January 1, 1999. Since that time, the NCUA has been approving expansions to multiple common bond credit unions at a rapid rate. According to the information attached to the memorandum of Defendant-Intervenor NAFCU, as of January 8, 1999, the NCUA had approved 24,116 potential new credit union members under the rule, a rate of more than 6,000 every business day.[18] The NCUA's past conduct also suggests that it will move aggressively to implement its new membership rules without regard to this pending litigation and the difficulty of dismantling field of membership expansions once they are approved.[19]

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[17] It is irrelevant that, as the NCUA claims, Congress may not have "intended to shield banks from competition." (NCUA Opp. at 45 n.33.) As the Supreme Court held only last year, "[E]ven if it cannot be said that Congress had the specific purpose of benefiting commercial banks, one of the interests arguably to be protected by [the FCUA] is an interest in limiting the markets that federal credit unions can serve." First Nat'l, 118 S. Ct. at 935.

[18] Despite numerous requests, the NCUA has refused to provide the ABA voluntarily with any information relating to those approvals. We were advised by counsel for NAFCU, however, that the NCUA voluntarily provided it with this information, (NAFCU Opp., Ex. 5), upon their request. It is outrageous for the agency to cooperate with one party while refusing to assist another in this way. We ask that, as a matter of fundamental fairness, the Court not permit the NCUA to rely on information that it has withheld from us. (See, e.g., Declaration of Robert E. Loftus (Attached as Exhibit E to NCUA Opp.).)

[19] In previous cases, the NCUA implemented its rules in defiance of court decisions and without regard to pending legal challenges. See, e.g., First Nat'l Bank, Nos. 90-2943, 96-2312, slip op. at 7 ("The ABA case was filed by plaintiffs only when they were alerted in August to NCUA's unwillingness to accept the D.C. Circuit decision . . . , and its startling assertion upon return of the mandate that it would not voluntarily obey it . . . ."). Given this track record, it is

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In light of the significant, imminent, and non-compensable injury IRPS 99-1 causes to ABA member institutions, there is ample basis to conclude, as Judge Jackson did in comparable circumstances, that the ABA will suffer irreparable harm if IRPS 99-1 is not enjoined pending this Court's decision on the merits.

**D. The Public Interest Is Advanced, and Third-Parties Are Not Harmed, By the Issuance of Injunctive Relief.**

Contrary to the NCUA's claims, (NCUA Opp. at 47-48), the interests of third-parties seeking to join credit unions, as well as the interests of the public, will be served, not harmed, by the issuance of injunctive relief pending final resolution of this case. If we are right, customers who join credit unions under the challenged provisions of IRPS 99-1 do so without legal authority. It contravenes the public interest for federal credit union membership to be increased in violation of the statutory limitations set forth by Congress. Moreover, given the NCUA's aggressive approval of new credit union members, if the agency is permitted to proceed, thousands of individuals may be led to sever their existing financial relationships with non-credit union institutions only to find that the solicitous credit unions cannot lawfully serve them. Such needless disruption of the financial affairs of thousands of individuals cannot serve the interests of these third-parties or the public.

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12/ (...continued)
simply unreasonable to expect ABA members to rely on the good will and prudence of the NCUA in implementing a rule while under court review.

E. The NCUA Promulgated IRPS 99-1 in Violation of the APA.

The NCUA cannot justify its attempt to make its membership rule effective just two days after the rule's publication in the Federal Register -- well short of the 30-day notice period required by the APA. See 5 U.S.C. § 553(d).

First, contrary to the NCUA's contentions, the ABA has standing to challenge the NCUA's failure to comply with this provision. The NCUA itself says that "[t]he purpose of this waiting period is to give affected parties a reasonable time to adjust their behavior before the final rule takes effect." (NCUA Opp. at 41 (quoting Omnipoint Corp. v. FCC, 78 F.3d 620, 630 (D.C. Cir. 1996))) (emphasis added). The Supreme Court has held in unmistakable terms that the ABA and its member institutions are parties "affected" by NCUA rules governing credit union membership.[20/] The ABA thus has standing to challenge the NCUA's failure to comply with the APA's procedural requirements.

Second, the NCUA cannot take advantage of the exception to section 553(d) for rules that "relieve a restriction" because no "restriction" existed within the meaning of the APA. See 5 U.S.C. § 553(d)(1). While the NCUA and its allies view the Supreme Court's decision in

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20/ In First National, 118 S. Ct. 927 (1998), the Court held that "as competitors of federal credit unions, [banks and banking associations] certainly have an interest in limiting the markets that federal credit unions can serve, and the NCUA's interpretation [of its membership rules] . . . affect[s] that interest by allowing federal credit unions to increase their customer base." Id. at 936 (emphasis added). The NCUA offers no support for its contention that only regulated entities are "affected parties" for purposes of the 30-day waiting period. (NCUA Opp. at 41.) Courts interpreting section 553(d) have recognized that there is a broad range of activity that the waiting period is meant to encourage. See, e.g., Union Oil Co. v. United States Dep't of Energy, 688 F.2d 797, 812 (Temp. Emerg. Ct. App. 1982) (purpose of § 553(d) is to "afford persons affected a reasonable time to prepare for the effective date of the rule or rules or to take other action which the issuance may prompt" (quoting S. Rep. No. 752. 79th Cong., 1st Sess. 15 (1946)) (emphasis added)).

First National as having imposed a "restriction" on credit union membership that the NCUA is now lifting, the fact is that the limitations on membership were in the FCUA since 1934 and what the Supreme Court did was to declare that the NCUA was violating that Act. Congress changed the Act in a variety of ways thereafter, and IRPS 99-1 implements (or is supposed to implement) a new set of statutory authorities and restrictions imposed by Congress in the CUMAA. For this reason, the current situation is a far cry from that which existed in Independent U.S. Tanker Owners Comm. v. Skinner, 884 F.2d 587, 591 (D.C. Cir. 1989), the only case the NCUA relies on in making an argument to the contrary. (NCUA Opp. at 42.) In Skinner, the Maritime Administration was attempting to relieve a single restriction from a fifty year old statutory scheme (in a manner that the Supreme Court determined was within the agency's authority). The agency was not implementing a brand new set of statutory guidelines and restrictions, as the NCUA is here.

Finally, the NCUA cannot excuse its failure to comply with the APA's waiting-period provision by claiming the benefit of the "good cause" exception.[21/] IRPS 99-1 is the product of ordinary -- not emergency -- rulemaking, and the "harm" the NCUA cites is merely the delay (the vast bulk of it due to the time the NCUA took for the rulemaking process) routinely associated with the process of adopting regulations to implement new statutory provisions. ABA agrees that the appropriate remedy for violations of section 553(d) is to stay

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21/ As NAFCU admits, the rule the NCUA approved on December 17, 1998, did not contain any finding of good cause. (NAFCU Opp. at 21.) It was only after counsel for plaintiffs made this fact known to the NCUA that the agency held a vote on the good cause issue, apparently without a meeting, on December 22, 1998. Despite the belated addition of good cause language, the Federal Register does not tell the public that the good cause determination was made well after the rule was adopted.

IRPS 99-1's effective date until January 29, 1999 -- 30-days after the rule's publication -- but of course, in addition, all credit union approvals made while the rule was unlawfully in effect must be invalidated. Such a return to the status quo ante is the only way to remedy the effects of the premature implementation of the rule.[22/]

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22/ The NCUA errs in contending that the ABA is somehow precluded from objecting to the agency's failure to comply with section 553(d) because it had "actual notice" of the rule. First, there is no exception to the APA's waiting period where there is actual notice. See 5 U.S.C. § 553(d). But, more importantly, in light of the material differences between the version of the rule the NCUA published on its website and the rule it actually promulgated, see note 21, supra, it is hardly reasonable for the NCUA to claim that knowledge the ABA gleaned from the agency's website is sufficient notice for purposes of section 553(d).

## CONCLUSION

For these reasons, and those provided in its opening memorandum of law, ABA has met the standard for the issuance of a preliminary injunction.[23/] Accordingly, ABA respectfully requests that the Court enter a preliminary injunction preventing the NCUA from implementing IRPS 99-1.

Respectfully submitted,

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23/ As this Court has held, in accordance with this Circuit's precedents, "[N]o single factor [in the preliminary injunction test] is dispositive." Kelso v. United States Dep't of State, 13 F. Supp. 2d 1, 3 (D.D.C. 1998). The preliminary injunction "calculus reflects a sliding scale approach." Id.

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